UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

RIDGEWOOD HEALTH CARE CENTER, INC.
AND RIDGEWOOD HEALTH SERVICES, INC.
A SINGLE EMPLOYER

Case 10–CA–113669
and 10–CA–136190

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION (USW)

Jeffrey Williams, Esq., for the General Counsel.
Ashley H. Hattaway and *Ron Flowers, Esqs. (Burr & Foreman, LLP),*
of Birmingham, Alabama, for the Respondents.
Richard P. Rouco, Esq. (Quinn, Connor, Weaver, Davies
Rouco LLP), of Birmingham, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Birmingham, Alabama on December 15–17, 2014. The complaint, based on timely filed charges by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) ("the Union') alleges that the Ridgewood Health Care Center, Inc. (RHCC) and Ridgewood Health Services, Inc. (RHS) constitute a single business enterprise and violated Section 8(a)(5), (3) and (1) of the National Labor Relations Act (the Act) when they assumed the operation a nursing home in Jaspar, Alabama on October 1, 2013 and engaged in a discriminatory hiring scheme in order to avoid becoming a successor to the previous employer and then refused to recognize, bargain with and provide information to the Union as the employees' labor representative. The complaint further alleges that Respondents made unlawful statements to the predecessor's employees and unlawfully interrogated job applicants in violations of Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondents and Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent RHCC is an Alabama corporation which owns property and a facility located in Jaspar, Alabama. RHS, also an Alabama corporation, leases that facility from RHCC and operates it as a nursing home. In conducting their operations annually, each derives gross revenues in excess of $100,000. In operating the facility, RHS purchases and receive goods and services valued in excess of $5,000 directly from points outside of Alabama. RHS admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act as a health care institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

RHCC denies that it is an employer or a health care institution engaged in interstate commerce. However, for the reasons explained below, RHCC and RHS constitute a single-integrated business enterprise. Consequently, since RHS is admittedly subject to the Board's jurisdiction, RHCC is also deemed to be an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. See *Precision Industries, 320 NLRB 661, 667 (1996)* (where one entity of single-employer is subject to the Board's jurisdiction, all entities part of that single employer are subject to the Board's jurisdiction). See also *Insulation Contractors of Southern California*, 110 NLRB 638 (1955) (all members of a multiemployer group who participate in, or are bound by, multiemployer bargaining negotiations are considered as a single employer for jurisdictional purposes.).

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Ridgewood Facility's Ownership and Operations

The Ridgewood Health Care Center, located at 201 Oakhill Road, Jaspar, Alabama (the Ridgewood facility), is a skilled nursing home facility with 98 licensed beds.[1] The Ridgewood facility is owned and operated by RHCC, which was incorporated in 1977. In 2008, Joette Kelly Brown purchased RHCC and Ridgeview Health Care Center, Inc., another nursing facility in Jasper (the Ridgeview facility), and Ridgeview Health Services, which operates the Ridgeview facility). Brown owned 100 percent of RHCC until October 2013, when her sister, Alicia Stewart, obtained 10 percent ownership.[2]

From 2002 through September 30, 2013,[3] RHCC leased the Ridgewood facility to Preferred Health Holdings II, LLC (Preferred) to continue operating as a nursing home. James Walker was Preferred's owner and operated the Ridgewood facility during that time. In 2013 and 2014, RHCC's only revenue came from lease payments by Preferred prior to October 1, 2013, and by RHS subsequent to October 1, 2013.[4]

[1] The Respondents concede that the maximum number of beds certified by the State licensing agency is 98. (Tr. 547.)

[2] Brown and Stewart, as well as Stephen Brown, are statutory officers and agents of both companies within the meaning of Sections 2(11) and (13) of the Act. (Jt. Exh. 2, Stipulated Facts 1–2, 5–6, 12–13.)

[3] All dates are in 2013 unless otherwise indicated.

[4] Stip. Fact 8.

By 2012, the relationship between Brown and Walker deteriorated over unpaid rent and Brown decided that RHCC would not renew Preferred's lease for the Ridgewood facility after it terminated in December 2013. Further discussions resulted in an agreement to terminate the lease a few months early on September 30 and have RHCC assume operation of the Ridgewood facility on October 1. The appropriate Alabama licensing agency was notified.[5]

By letter, dated July 29, Walker notified employees that operations would cease on September 30, RHCC's lease agreement with Preferred would terminate and they would be laid-off.[6]

In order to operate the Ridgewood facility, Brown formed a new management company, RHS, in July 2013.[7] Since that time, Brown has served as owner and president. Brown owned 100 percent of RHS until October, when Stewart obtained 10 percent ownership. Since July, Stewart has served as vice-president and secretary of RHS. Brown and Stewart have been responsible for the formulation and effectuation of labor relations policy for RHS from October 1 to the present.[8]

Since October 1, RHS has operated the Ridgewood facility as a nursing home pursuant to a lease agreement with RHCC. Respondents also share a common liability insurance policy.[9]

B. The History of Employee Representation

Since 1976, certain job classifications at the Ridgewood facility have been represented by the Union and its predecessors. This recognition has been embodied in successive collective-bargaining agreements (CBA) with Preferred, the most recent of which is effective from September 24, 2010, to September 24, 2016.[10] The bargaining unit (Unit) consisted of the following Ridgewood facility employees:

> [A]ll full time and regular part time employees employed by the facility, including LPN's, nurses aides, housekeeping employees, dietary employees, laundry employees, maintenance employees, and the food supervisor (it is understood that in the event any of the preceding job titles change, they will remain in the bargaining unit) but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.[11]

In operating the Ridgewood facility, Preferred did business under the name, "Ridgewood Health Care Center." Although Preferred used a business name similar to its landlord, RHCC

[5] Jt. Exh. 23 at 2; CP Exh. 6 at 1.
[6] Stip. Facts 25-26.
[7] Stip. Facts 9.
[8] Brown and Stewart, as well as Stephen Brown, are admitted RHS supervisors and agents within the meaning of Section 2(11) and (13) of the Act. (Stipulated Facts 7, 9-11, 14.)
[9] CP Exh. 8.
[10] Jt. Exh. 3; Stip. Fact 17.
[11] Jt. Exh. 3 at 3.

(minus the "Inc."), RHCC and Preferred have always been distinct legal entities connected only through a lease for the operation of a nursing home at 201 Oakhill Road. During the term of Preferred's lease from 2002 to 2013, RHCC had no involvement in any collective-bargaining agreement between Preferred and the Union.

C. The Change in Ownership

Walker facilitated Brown's transition in assuming the operations of the Ridgewood facility by convening employees to meet her in July, 2013. Walker introduced Brown, who was accompanied by Stewart. Brown proceeded to explain that the facility's operations were being evaluated, but anticipated that the changeover would result in minimal changes, with wages and benefits essentially staying the same. With respect to the workforce, she expected that RHCC would hire "99.9 percent" of current employees.[12] Brown also responded to an inquiry about the CBA by indicating that she would have to honor it and recognize the Union.[13]

On July 15, RHCC's attorney, James A. Smith, Esq., took a different approach in his formal notification to Dudley and Lyons about the change in management of the Ridgewood facility from "Preston Health Services" to the "Ridgeview Operating Company." He explained that his client had not yet determined which incumbent employees would be retained and rejected the CBA then in effect as unacceptable. He added, however, that the "Ridgeview Operating Company nonetheless desires to engage in bargaining to develop an acceptable Collective-Bargaining Agreement to be in place when Ridgeview Operating Company assumes operation of Ridgewood Health and Rehabilitation. Please contact me at your earliest convenience so we may begin the bargaining process. We look forward to developing a mutually acceptable Agreement."[14]

On July 29, RHCC administrator Cindy Shifflett notified Lyons and facility employees that RHCC, as the "Landlord," would assume the facility's operations from Preferred, effective October 1 with a reduced number of employees. She further explained that RHCC had not agreed to rehire any of the Company's 141 employees and attached a spreadsheet outlining the affected positions.[15]

Brown, Stewart and Reverend David Wallace met again with Ridgewood facility employees in August to reassure that "99.9 percent" of them would be hired by RHCC. She expressed a belief that the Ridgewood facility was working fine and that things would basically stay the same.[16] Brown was also asked whether Preferred employees who had been previously

[12] Brown testified that she wanted the majority of employees to remain employed and did not dispute the credible testimony of several employees present at the first meeting, including Stephanie Eaton, McPherson, Crystal Wilbert, Teresa McClain, Debra Puckett and Chris Collette, that she mentioned the 99.9 percent hiring goal. (Tr. 25, 55, 58–59, 74–75, 77–78, 101–102, 131–132, 136–137, 148–149, 218–219, 260–262, 417–419, 549; Jt. Exhs. 2(5), (9)-(10) and (31)).

[13] Brown did not deny the credible testimony of Collette and Melissa Uptain that Brown expressed the belief at that point that RHCC was bound by CBA's terms and conditions. (Tr. 230, 353, 415–416.)

[14] Jt. Exh. 4.

[15] Jt. Exh. 5–6.

[16] Brown hazy recollection of what she said at these meetings was clarified by the credible testimony of Debra Puckett and Andrie Borden. (Tr. 260–261, 341–343, 418–419.)

discharged from the Ridgeview facility would be eligible to be rehired at the Ridgewood facility. She responded that those employees would be considered along with everyone else.[17]

When asked at these meetings about the role of the Union, Brown stated that she did not see the need for one and expected that management and employees would resolve any issues that arose. In support of her point, Brown mentioned that management and employees at the Ridgeview facility, where only nine of the Ridgeview facility's employees were unionized, were a close knit family.[18]

At this meeting, Brown also informed Preferred employees that she was creating a new job classification at the Ridgewood facility called "helping hands." Helping hands, already being used at the Ridgeview facility, were to perform some of the same duties performed by certified nursing assistants (CNA), such as cleaning closets and drawers, helping residents walk, transferring residents to different locations in the facility, picking up food trays, and distributing ice. However, unlike certified nursing assistants, helping hands are not certified.[19]

Brown's remarks certainly did not placate the Union, who proceeded to file an unfair labor practice charge against RHCC and "Ridgewood Operating Company" for repudiating the CBA.[20]

D. Interviews

A notice was posted at the Ridgewood facility instructing the 83 Preferred employees to call RHS by August 30 to schedule interviews between August 13 and August 30. Only requests for interviews received by August 30 were considered and Preferred applicants were interviewed by the first week of September.[21] The hiring process was coordinated by the Ridgeview facility's human resources director, SuLeigh Warren.[22]

Job interviews were conducted at the Ridgeview facility by two or three individuals from a management group that included Brown, Stewart, Warren, Kara Holland (Ridgeview's administrator) and Vicky Burrell (Ridgeview's director of nursing).[23] During this rushed and chaotic hiring process,[24] 65 Preferred employee/applicants were asked what they thought about

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[17] This finding is based on credible and undisputed testimony of Hope Kimbrell. (Tr. 58–59, 66–67.)

[18] Brown did not dispute the credible testimony of Teresa Haynes, Lynda Baker, Becky Ramos, Debra Thomas and Debra Puckett regarding her statements at these meetings. (Tr. 25, 43, 75–76, 147–148, 158–159, 260.)

[19] It is not disputed that helping hands have declined since RHS took over operations on October 1 and perform only some, but not all, CNA-related duties. (Tr. 158, 162–163, 261, 271–272.)

[20] Jt. Exh. 23 at 2.

[21] Brown testified that interviews were extended by a week. However, with the exception of Marcus Waldrop, who reapplied in October, there is no evidence that applications from Preferred employees were accepted after August 30. (Tr. 421–422, 525; Jt. Exh. 10 at 2.)

[22] Most witnesses also testified that Warren was their initial contact at RHS. (Tr. 688.)

[23] I credited Brown's testimony that she consulted with the other four admitted statutory agents in making her hiring decisions. (Stipulated Facts 2–3, 15–16; Tr. 222, 425–428, 617–618, 620, 651- 653.)

[24] Brown conceded that the process was chaotic. Warren described it as "very busy." (Tr. 426, 687.)

working at the Ridgewood facility and their suggestions for improved operations.[25] Some employees were asked by Brown, Holland and/or Warren about their wages, benefits and paycheck deductions and/or whether they were members of the Union.[26] Drug tests were also performed and employees were scheduled for physical examinations.[27]

By letter, dated September 11, Brown sent 51 of the 65 Preferred employee/applicants letter offers of employment. Subsequently, 56 letter offers of employment were sent to applicants not previously employed by Preferred.[28] The form letters stated, in pertinent part, that employment with RHS would be "at-will" and that either party could terminate the relationship at any time with or without cause or notice. The letter also stated that employment would be subject to the terms and conditions of employment set by RHS, which could change from time to time.[29] Employees not offered employment were sent a brief form letter with no explanation as to why they were not hired.[30]

The 51 Preferred employees offered employment with RHS accepted by September 16, the specified deadline for responses.[31] RHS decided not to offer employment to 18 Preferred employees. Preferred employees who applied, but were not hired, included Paul Borden, Lacey Cox, Betty Davis, Gina Eads (Harrison), Hope Kimbrell, Charlotte Kimbrough, Midge Lechey, Teresa Diane McClain, Connie Sickles,[32] Vegas Wilson and Malcolm Waldrop. Each of these employees had satisfactory documented work histories at Preferred.[33]

Five of the 18 employees denied employment by RHS previously worked at the Ridgeview facility, but were discharged from there prior to their employment with Preferred: Lacey Cox, Betty Davis, Gina Eads, Charlotte Kimbrough and Connie Sickles. Since the Ridgeview facility had a general policy of not rehiring employees previously discharged from that facility, Gina Eads asked her interviewers, Holland and Burrell, whether her previous discharge from that facility disqualified her from employment at the Ridgewood facility. They assured her that she had nothing to worry about and reflected that in their notes ("learned from the past, would like a chance.")[34] None of these other employee/applicants asked or were told about their prior discharges and the applicability of such a policy to the RHS's hiring process.[35]

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[25] Stip. Fact 34.

[26] The credible testimony of Stephanie Eaton, Pam McPherson, Becky Davidson, Paul Borden, Betty Davis and Crystal Wilbert was corroborated by Brown, Holland and Warren, who conceded that employees were asked about their benefits. (Joint Exh. 7; Tr. 80, 102–103, 130–131, 137–138, 149–150, 221–222, 251, 339, 417, 424, 426–428, 617–618, 651–652.)

[27] It is undisputed that employees scheduled for physicals were "conditionally" offered employment based on those results as well as background and reference checks. (Tr. 567, 653, 680.)

[28] Stip. Fact 35.

[29] Jt. Exh. 12.

[30] Jt. Exh. 13.

[31] Jt. Exh. 12.

[32] Respondent's offered Sickles employment record from Ridgeview, but did not produce interview notes from her interview. (R. Exh. 17.)

[33] This finding as to their work histories at the Ridgewood facility is based on the absence of any documentation to the contrary. (Stip. Fact 40.)

[34] I based this finding on the credible and undisputed testimony of Eads, as corroborated by the interview notes (Tr. 181–183; R. Exh. 8.)

[35] The "ineligible for rehire" entry in several personnel files, as well as Kimbrell's inquiry at the

Davis, Eads and Sickles had uneventful hiring interviews presenting no other obstacle to employment by RHS; Cox and Kimbrough did not, however, make good impressions. Cox was noted to be unfriendly, did not smile, initially omitted any reference to previous work at Ridgeview, and acted like she did not want to be there.[36] Kimbrough's interview attire was noted to be "dirty and she wore pajama shorts."[37]

The remaining six unit employees at issue were not previously employed at Riverview. One of those applicants, Vegas Wilson, had an uneventful interview and deserved to be rehired. Wilson was not hired because RHS's new director of nursing, Sheila Cooper, who worked previously with Wilson at another facility, told Brown that she had been terminated due to an altercation with a coworker. Such an incident was not documented in Wilson's Preferred personnel file and she was not given an opportunity to explain what happened.[38]

The remaining five applicants, however, did not merit offers of employment. Paul Borden, a maintenance worker, was interviewed by Brown and Holland. He presented as defensive, aggressive disinterested, with poor communication skills and misrepresented his work history.[39]

Hope Kimbrell's interview notes indicated that she was "very evasive, short curt answers, aloof, curling eyes when asked direct questions, unprofessional."[40] In addition, Brown was aware of negative remarks by a friend, Stacy Alley, whose late father had been cared for at the Ridgewood facility. Alley had informed Brown, sometime prior to October 1, about Kimbrell's impolite and disrespectful treatment towards her father and family members.[41]

August meeting, confirm that such a policy existed at Ridgeview. (Tr. 58–59. 66–67.) However, Brown's reliance on this policy as a basis for her refusal to rehire these employees was not credible. (Tr. 438–439.) Cox, Davis, Kimbrough and Sickles credibly testified that they were not asked about their previous employment at Ridgeview. (Tr. 181–183, 253, 436–440, 443–445, 467–468, 472–473, 535.) Nor was there any reference in the interview notes to any applicant's ineligibility for rehire. (Tr. 695–697.)

[36] Cox did not refute credible and corroborated testimony by Brown and Warren regarding his interview performance. (Tr. 656–658; R. Exh. 4.)

[37] I based this finding on the credible and undisputed testimony of Warren and Holland, as corroborated by their interview notes. (Tr. 626–627, 659–660; R. Exh. 13.) In addition, Warren made a similar recommendation with respect to non-Preferred applicant Debra Pittman. (Tr. 667.)

[38] In the absence of any notes of Wilson's interview, I do not credit Brown's testimony as to what Cooper, who did not testify, told her. (Tr. 475, 533–534.) Moreover, RHS's hiring assessment here was also less than credible because Wilson was not asked about this previous, undocumented incident, and given an opportunity to explain. Nor does RHS' reliance on a similar decision not to hire another applicant, Melissa Harrington, also based on Cooper's recommendation, provide further corroboration since there are no facts to compare the personnel history of the two employees. (R. Exh. 23.)

[39] While I did not credit uncorroborated hearsay about Borden's prior conduct, I found testimony by Brown and Holland regarding his interview performance to be credible and corroborated by the interview notes. (Tr. 429–431, 525–529, 618–621; R. Exh. 1.) In addition, Respondents presented credible evidence that other applicants were not rehired for similar reasons. (Tr. 485–486, 669–672; R. Exh. 25, 28, 31.)

[40] R. Exh. 9–10.

[41] Notwithstanding the fact that this background information was not noted in Kimbrell's interview notes, I credited Brown's testimony, as corroborated by Alley's credible testimony, that the latter passed along this information prior to October 1. (Tr. 445–448, 610–611.)

Similarly, Brown declined to hire McClain because of her inability to work well with others. During the interview process, three applicants—Lavetta Webster, Crystal Wilbert and Lynda Baker—complained about continuous harassment and insults heaped on them by McClain.[42]

Midge Lechey's interview was satisfactory, but she was not hired based on Warren's recommendation because she did not have an Alabama license to practice as a CNA and failed to list a second job on her application. Lechey was informed that she needed such a license for the job, but did not respond or follow up by getting one.[43]

Lastly, Preferred employee Marcus Waldrop applied, was interviewed, drug tested and offered employed conditioned on a satisfactory physical examination. However, Waldrop missed his scheduled physical and was not initially allowed to reschedule it. Waldrop did, however, reapply after October 1 and was hired on October 16, albeit at a lower wage than he earned while employed by Preferred.[44]

Applications from non-Preferred employees were received beginning September 1 and continued beyond October 1.[45] As RHS essentially concluded its hiring of Preferred employees by the second week in September, it began to interview from among 111 applicants not currently employed by Preferred.[46]

In conclusion, RHS declined to hire four (4) employees who merited offers of employment: Betty Davis, Gina Eads, Connie Sickles and Vegas Wilson.

E. The Union's Response

On September 10, Lyons formally responded to the communications from Smith and Shifflet by requesting that RHCC and its "alter ego Ridgeview Operating Company" bargain with the Union over the unit employees' layoffs and the effects of that decision. She referenced the extant CBA and the unlawfulness of its repudiation by the "Landlord" or the Ridgeview Operating Company. Lyons added that the Ridgeview Operating Company, as a successor employer was still obligated to bargain with the Union.[47]

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[42] I based this finding on the credible testimony of Brown and Warren, as corroborated by Wilbert and Baker. (Tr. 46–47, 132–133, 472, 532, 663.)

[43] Warren's credible testimony was not disputed. (Tr. 471–472, Tr. 661–662, 684–685; R. Exh. 14.) Nor do I credit the General Counsel's assertion that, since the process of getting such an Alabama license is quick and easy, that it was incumbent on RHS to provide that opportunity. (Tr. 682–683.)

[44] Waldrop's testimony is vague as to the timeframe when he called to reschedule his physical, but it was clearly sometime in September. Moreover, I credit his testimony that his request to retake it was initially denied by Warren. (Tr. 91–95.) In any event, similar treatment was applied non-Preferred applicant Connie Wood, who was denied employment because she missed her physical. (Tr. 492–493, 628–629; R. Exh. 32.)

[45] Stip. Fact 29.

[46] Stip. Fact 33; R. Exh. 22, 24, 26, 28, 30, 32–36.

[47] Jt. Exh. 8.

On September 13, relying on the CBA, the Union followed up on its demand to bargain by seeking "a full account of the Company's plans with regards to its transition from operation by Preferred Health Holdlings II d/b/a/ Preston Health Services to self-operation." The request sought information relating to the following subjects within 7 days: job titles of positions and names of employees affected by the planned layoffs; termination benefits to be provided; hiring applications; hiring standards to be used; number of employees to be rehired; plans to change current terms and conditions of employment; and ownership, operational, financial, contractual, legal and insurance documents explaining the relationship between RHCC and RHS.[48]

On September 23, Respondents' new attorney, Ashley H. Hattaway, Esq., rejected Lyons position in her letters of September 10 and 13, and sought to clarify the "confusion" over the changes at the Ridgewood facility. She explained that "Ridgewood Health Care Center, Inc.," which has owned the Ridgewood facility and the property where it is located, leased the property in 2002 to "Preferred Health Holdings II, LLC," which has no corporate relationship to RHCC. Hattaway also disavowed any connection between Brown, who purchased RHCC in 2008 and Preferred's operation of the Ridgewood facility since that time. Thus, neither RHCC nor RHS were bound by any CBA entered into between Preferred and the Union. Hattaway further explained that Smith's previous reference to a "Ridgeview Operating Company" was incorrect and the correct name of the new company formed by Brown to operate the facility on October 1 was "Ridgewood Health Services, Inc."

Hattaway reiterated Smith's July 15 comments rejecting the CBA under which Preferred has been operating and Brown's willingness to bargain with the Union "should Ridgewood be considered a successor of Preferred." She denied that RHS was an alter ego of RHCC or a joint employer with RHCC and again disavowed any obligations by RHCC under the CBA, noting that her client merely owns property and has no employees. As such, RHCC would "set terms and conditions of employment for the employees it hires to begin when it takes over operation of the facility." In conclusion, Hattaway explained that the Union's requests for information and to bargain over Ridgewood employees' terms and conditions of employment were premature until it was determined at the conclusion of the hiring process if RHS did, in fact, become Preferred's successor.[49]

On September 25, the Union's attorney, Keren Wheeler, responded to Hattaway's letter and disputed her assertion that RHCC was not bound by the Union's CBA with Preferred. Wheeler asserted that RHHC and RHS shared common ownership, management and legal counsel, and that RHS, as RHCC's alter ego, was bound by the CBA and would become a successor employer to Preferred on October 1. She also noted that the rehiring/application process was underway and Preferred employees hired by RHS comprised "a majority of employees who were previously part of the USW bargaining unit." Wheeler renewed her demand that RHS recognize the Union as the exclusive representative of the bargaining unit employees and included an information request in order to prepare for bargaining. The request sought detailed information, including Preferred employees offered and denied employment, employees hired and their terms and conditions of employment, including benefits.[50]

[48] Jt. Exh. 9.
[49] Jt. Exh. 10.
[50] Jt. Exh. 11.

By letter, dated September 30, Hattaway again disagreed that RHCC was a party to the CBA. She conceded that Preferred did business as "Ridgewood Health Care Center," but denied that RHCC ever authorized Preferred to operate under that name. She also reiterated the lack of any previous relationship between the Union and RHCC during the term of the CBA and the prematurity of a successor employer claim prior to the conclusion of the hiring process.[51]

F. The Change in Operations

Based on the Ridgewood facility's average total number of employees reflected on the work schedules over a 1-year period, the average full compliment consisted of 88 employees. In August 2013, the Ridgewood facility was still adequately staffed with 83 employees to cover 98 beds divided into three sections.[52]

On October 1, RHS assumed operational control of the Ridgewood facility. A total of 101 employees, out of the 107 applicants hired for positions in the nursing, housekeeping, laundry, dietary and/or maintenance departments, accepted employment and reported for work; 49 of the employees who reported were Preferred employees as of September; 52 of the new employees never worked for Preferred.[53] Only 82 of the 101 new employees, however, fell under the Preferred bargaining unit classifications; 19 of the 101 employees had been hired under the new "helping hands" job classification to assist CNA's with some of their duties.[54]

After assuming control of the Ridgewood facility, RHS changed several terms and conditions of employment, including the elimination of the seniority list, two holidays, the 401(k) retirement plan and payroll deductions for short term disability insurance. RHS also modified work schedules and postings, vacation accruals, and life insurance coverage.[55]

On October 1, Wheeler wrote to Brown and Hattaway reiterating her contention that RHS and RHCC were successor employers because a majority of its workforce as of "September 30 and on October 1, by which time Ridgewood Health Services, Inc. was operating normally, was composed of bargaining unit employees who have been covered by the CBA." She again submitted a request seeking the same hiring information requested on September 25 and asked to proceed with bargaining.[56]

Hattaway rejected Wheeler's contentions on October 7, noting that RHS began operating the Ridgewood facility on October 1 but "still is actively filling positions and anticipates hiring

[51] Jt. Exh. 12.

[52] Brown vaguely alluded to the need for more staffing in order to provide superior service and a hiring freeze at the time (Tr. 422–423, 490, 544.), and Debra Thomas, a CNA, conceded that she worked overtime in September because of a staffing shortage. (Tr. 170.) However, Brown confirmed Collette's credible testimony that the Ridgewood facility was adequately staffed when she assumed control on October 1. (Tr. 357, 366, 376–380, 390–391, 396–399; CP Exh. 1–4 and Appendix A, Summary Chart.)

[53] Stip. Facts 36–37.

[54] There is no credible evidence that RHS hired less CNA's than necessary to adequately staff the facility. (Jt. Exh. 21; Tr. 261, 271, 390–391.)

[55] These changes are not disputed. (Tr. 164–165, 267–269.)

[56] Jt. Exh. 15.

many more employees in the near future" since "a lower than expected number of Preferred employees applied to work with Ridgewood." She further noted:

> Moreover, even if it was assumed that the Company had hired a substantial and representative complement of its workforce by the first day of operations as you assert, the majority of employees hired in job positions that were in the bargaining unit represented by the USW were not previously employed by Preferred. Therefore, even if a substantial and representative complement had been hired, Ridgewood Health Services, Inc. would not be a successor and will not and indeed cannot recognize the USW as the representative of those employees. Likewise, it has no obligation to respond to your requests for documents.[57]

During the 6 weeks after October 1, RHS hired an additional 22 non-Preferred applicants into positions performing work which had been performed by Preferred's bargaining unit.[58]

G. Brown Reasserts Nonunion Position

On October 22, Brown sent each employee a letter reasserting her position that the Ridgewood facility was operating "non-union." The letter, which also included preemptive action to keep the Union out of the facility, stated in pertinent part:

> I am very excited about our first three weeks of operation at that Ridgewood- facility. I think we are off to a great start. I really appreciate the dedication that each of you has shown during this transition time.
>
> I am sending you this letter to address something that is very important to you, me, and the future of the Company. I wanted to explain to you the Company's position regarding unions and to give you some basic information about union cards, so that, if you are ever asked to sign a union card, you can make an informed decision. As you know, the Ridgewood facility is now operating without a union. We do not know of any union activity at Ridgewood at this time, but I want you to be informed should you be asked to make any decisions regarding a union in the future.
>
> Our position on unions is that they are unnecessary at our facility. We have a great group of managers and employees, and we are working together well to move this facility forward, I have a vision of creating an environment at Ridgewood that is a great place to be for our residents and our employees, and I think we can best accomplish this vision if we work directly together to make this happen. I think that without a union we can be our most productive, efficient and flexible so that this facility will prosper. I do not want you to have to pay monthly dues to the union when we can make Ridgewood a great place to work just by working together.
>
> I want to address union cards because asking employees to sign union cards is often how a union initiates the process of making the facility unionized. A union card is a legal document that gives the union the right to be your exclusive representative. Once you sign a card, the union does not have to give it back to you even if you change your mind.

[57] Jt. Exh. 16.
[58] Stip. Fact 38.

> In my mind, it is like giving a blank check to a stranger as you have no guarantees of what will happen if you sign a card.
>
> A union card does not guarantee that employees will be able to vote for whether they want a union. If the USW gets a majority of our employees to sign these cards, it can ask the Federal government to force the union into Ridgewood without any election at all. In some cases employees get a vote to decide whether to bring in a union, but in other cases the unions have used the signed cards alone to attempt to represent the employees of the facility. If a majority of the employees support the union, the union will represent all of the employees in the bargaining unit, including the ones that did not want them fu the facility.
>
> As you can see signing a union card is a serious matter. It is your choice whether to sign a card. No one should pressure you to sign a card. If you are ever asked to sign a union card, I urge you to ask questions and get all the facts before deciding whether to sign. I believe you deserve to be fully informed of what can happen if you sign a card.
>
> Unions have declined over the last few decades, and I think for good reason. Unions have not been able to provide employees with those things that employees value most including job security. I am sure you know of the many unionized plants that have shut down around this country. I believe that working together with exceptional care towards our residents and mutual respect among our employees, we can be our most competitive and prosperous.

Brown reinforced the message in her October 22 letter in meetings with employees several days later. In the meeting, she told employees that the Union was neither recognized nor needed as their labor representative because she expected employees to work issues out with management. Brown also stated, when asked what she would do if the Union ended up representing employees, that it was possible she would close the facility.[59]

RHS's antiunion sentiments resurfaced in January 2014, when Cooper, former director of nursing, told Bolinger, a CNA, that she overheard Bolinger and other CNA's discuss recruitment for the Union. Copper warned that if she confirmed such discussion that it would cost Bolinger her job. Bolinger said she needed her job and denied engaging in such a conversation.[60]

H. RHS Implement Disciplinary Action

RHS effectively discharged Caitlyn Bolinger on January 30, 2014 when the RHS administrator sent her home and told her not to return to work until she was cleared by her psychiatrist. Bolinger complied with the directive and called RHS about a week later in order to return to work. However, RHS management never returned her call.[61]

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[59] Brown had a vague recollection about the meeting, but did not dispute credible testimony by Debra Thomas, Joann Tidwell and Audrie Borden that she made such statements. (Tr. 164, 193, 343–344, 420.)

[60] Bolinger's credible testimony was not refuted. (Tr. 107.)

[61] Although the Company sought to establish on cross-examination that Bolinger resigned and was not discharged, she credibly explained that she was told by Sandy Prescott, an RHS administrator, not to return until she was cleared by a psychiatrist. She complied and called Prescott a week later, but Prescott did not return the call. (Tr. 106, 114, 119-124.) The Company did not offer testimony to the contrary.

In June 2014 and August 2014, without notice to or bargaining with the Union, RHS issued verbal warnings to employees Brook Watson and Misty Mauldin, respectively. The discipline escalated to written warnings to Watson in July 2004 and Mauldin in September 2014 without notice to or bargaining with the Union. The discipline graduated to the next level when RHS suspended Mauldin and Watson on September 25, 2014, and October 8, 2014, respectively, without notice to or bargaining with the Union. Finally, RHS terminated Mauldin on October 20, 2014 and Watson on October 27, 2014,[62] in both instances without prior notice to or bargaining with the Union.[63]

Pursuant to the Union's CBA with Preferred, the imposition of discipline, as a term and condition of employment pursuant to Article 7, was subject to bargaining pursuant to the grievance procedure set forth at Article 8.[64]

LEGAL ANALYSIS

I. Single Employer

The General Counsel alleges that RHCC and RHS constitute a single employer. In support of this position, the General Counsel argues that both entities share common owners, common officers, and a common liability insurance policy. The Company argues that RHCC employs no individuals, has no control over labor relations, and is therefore not an employer.

Separate entities constitute a single employer when they fail to maintain an arm's-length relationship. *Bolivar Tees, Inc.*, 349 NLRB 720 (2007). Factors indicative of such failure include: (1) common ownership or financial control; (2) common management; (3) interrelation of operations; and (4) common control of labor relations. *Spurling Materials, LLC.*, 357 NLRB No. 126, slip op. at 9 (2011). Absence of a common business purpose between the two entities is not dispositive. *Lederach Elec., Inc*., 362 NLRB No.14, slip op. at 3 (2015).

In 2008, Brown purchased RHCC. She owned 100 percent of RHCC until October 2013, when her sister, Stewart, obtained 10 percent ownership. RHS was founded by Brown and incorporated in July 2013 solely for the purpose of operating the Ridgewood facility. To facilitate that objective, RHCC leased the Ridgewood facility to RHS to operate as a nursing home, effective October 1. Brown owned 100 percent of RHS until October, when Stewart obtained 10 percent ownership. Brown and Stewart have served as the principal officers of RHS and have been responsible for the formulation and effectuation of its labor relations policies. Since October 1, the Respondents have also shared a common liability insurance policy covering the Ridgewood facility's operations.

RHCC and RHS have common ownership, common management, and interrelated operations. The fact that RHCC has no control over labor relations carries little weight given that

[62] At the hearing, the General Counsel withdrew paragraph 25(e) of the complaint regarding Darlene Parker's discharge on November 13, 2014. (Tr. 320.) On January 26, 2015, the General Counsel withdrew paragraph 25(d) of the complaint regarding Keaton's discharge on October 30, 2014.

[63] Stip. Facts 48–52.

[64] Jt. Exh. 3 at 5-7.

it has no employees. *Three Sisters Sportswear*, 312 NLRB 853, 863 (1993). Thus, RHCC and RHS constitute a single employer. *Imco/International Measurement Co*., 304 NLRB 738 (1991). Therefore, both entities are jointly and severally liable for remedying any violations of the Act. *Carnival Carting*, 355 NLRB 297 (2010).

II. Successor Employer

The General Counsel also alleges that Respondents are successors to Preferred. Respondents deny the charge on the grounds that a substantial and representative compliment of Preferred employees had not been hired prior to, and Preferred employees did not constitute a majority on, October 1.

During the operative period, where a majority of current employees were employed by the preceding employer, a change in ownership is not sufficient to affect the certification of a union and attending collective-bargaining contract. See *NLRB v. Burns International Security Services, Inc*., 406 U.S. 272, 278–279 (1972). Accordingly, the subsequent employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987).

A. Substantial continuity

The first factor in this analysis is whether there was a substantial continuity of operations. The General Counsel asserts that there is based on the continued operation of the Ridgewood facility, which has existed for nearly 40 years, as a licensed 98-bed nursing home. RHS does not dispute this contention.

Evaluation of successor status depends upon a fact-based totality-of-the-circumstances analysis. See *Fall River Dyeing & Finishing Corp*., 482 U.S. at 42. This substantial-continuity analysis is performed from the employees' perspective as to whether their job situations are essentially unaltered. Id. at 43 (internal quotation marks omitted). Factors include whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. Id.; *Great Lakes Chemical Corp*., 280 NLRB 1131, 1132 (1986).

Notwithstanding the injection of helping hands into the workforce, RHS and Preferred operated the same type of business, with the same processes and body of customers. There is no doubt that RHS's employees continued to view their jobs as essentially unaltered and, thus, there is a substantial continuity of operations between RHS and Preferred.

B. Majority status

The General Counsel, excluding the helping hands, alleges that Preferred employees constituted a majority of RHS's workforce on October 1. The Respondents, asserting that the helping hands performed bargaining unit work and should be included in the workforce analysis as of October 1, beg to differ.

Majority status is a necessary but not sufficient condition to successor status. See *Vermont Foundry Corp*., 292 NLRB 1003, 1009 (1989). Majority status is generally measured on the initial date of operation. Id.; *NLRB v. Burns International Security Services, Inc*., 406 U.S. at 278–279. An exception to this rule occurs when the successor starts with a few employees and requires a startup period to build operations and hire employees. *Fall River Dyeing & Finishing Corp*., 482 U.S. at 47–48. In such cases, majority status is evaluated when the successor hires a substantial and representative complement. Id. at 48–49. Majority status is a rebuttable presumption which continues despite a change in employers. Id. at 38.

The Respondents argue that the helping hands must be included in the bargaining unit. They premise this argument on the notion that helping hands perform bargaining-unit work, notwithstanding their inclusion in a new position title, because it is a circumstance which was contemplated by the CBA. The General Counsel argues that because the helping hands classification was not included in the historical bargaining unit, and neither the Union nor the predecessor requested that they be so included, helping hands employees may not be included in the current bargaining unit.

Complete analysis of majority status depends upon a prior determination of whether the bargaining unit of the predecessor employer remains appropriate for the successor employer. See *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994). Continued appropriateness is measured at the time the bargaining obligation attaches. *Cadillac Asphalt Paving Co*., 349 NLRB 6, 9 (2007). Absent compelling circumstances, an established bargaining relationship will not be disturbed. See *Columbia Broad. Sys*., 214 NLRB 637, 643 (1974). Consideration of whether the addition of a small group of employees to the existing unit is appropriate analyzes, as between the two groups: (1) interchange and contact; (2) similarities in skills, functions, interests and working conditions; (3) proximity; (4) bargaining history; and (5) degree of common supervision and control. See *Ready Mix USA, Inc*., 340 NLRB 946, 952–953 (2003). Such addition, or accretion, is thus appropriate only when the new employees have little or no separate identity and where the two groups share an overwhelming community of interest. See *NV Energy, Inc*., 362 NLRB No. 5, slip op. at 3 (2015). The two critical factors in this analysis are employee interchange and day-to-day supervision. See id. In light of the fact that accreted employees are absorbed into an existing bargaining unit without an election or other demonstrated showing of majority status, accretion analysis is more restrictive than a traditional community-of-interests analysis. See *Corbel Installations, Inc*., 360 NLRB No. 3, slip op. at 24–25 (2013).

Helping hands perform some, but not all, of the same duties previously performed by Preferred's certified nursing assistants and are not certified. Thus, though there are some similarities of skill, functions, interests, and proximity, the two positions are not interchangeable and differ in regard to day-to-day supervision.

The Respondents, citing *Tarmac America, Inc*., 342 NLRB 1049, 1050 (2004), *Texaco Port Arthur Works Employees Federal Credit Union*, 315 NLRB 828 (1994), and *Wiedemann Mach Co*., 118 NLRB 1616 (1957), contend that the duties, not the title, of a position are determinative. In *Tarmac America*, employees classified as "forklift operator" and "yard person" performed essentially the same work; additionally, neither party disputed that the two terms were

used interchangeably to refer to the same position. 342 NLRB at 1049–1050. *Tarmac America* is thus not pertinent insofar as the parties' consensus obviated the burden of proof.

With respect to *Texaco Port Arthur* and *Wiedemann Mach Co*., the issue in each case was whether the employer had validly excluded a new classification of employees from the bargaining unit. Therefore, the question was not one of accretion but rather, deletion, in which case the proponent bears the burden of proving dissimilarity. See *Texaco Port Arthur Works Employees Federal Credit Union*, 315 NLRB at 830. The cases relied upon by the Respondents are thus "peripheral" to accretion analysis in that they involve instances in which the requisite burden of proving inclusion in the unit was either not at issue or was directly contrary to the burden of proof within an accretion analysis. Id. (internal citation omitted).

The Respondents also argue that the work performed by helping hands has always been performed by bargaining unit employees: certified nursing assistants perform certified nursing aide duties, while helping hands perform the noncertified portion of CNA duties. In so arguing, the Respondents confuse the part for the whole. The fact that helping hands performed a subset of duties performed previously by unit employees did not warrant the creation of a new job classification within the bargaining unit. The Respondents have thus failed to meet their burden of proof in establishing that helping hands must be included in the bargaining unit.

Accordingly, the 19 helping hands employees should not have been included within the bargaining unit and the appropriate bargaining unit as of October 1 is deemed to have consisted of 82 employees. Under those circumstances, former Preferred employees comprised 49 members of the unit and, thus, constitute a majority thereof.

Based on the foregoing, there was a substantial continuity of operations between Preferred and RHS, former Preferred employees/unit members constituted a majority of the employees hired into appropriate bargaining unit classifications by RHS, and RHS is deemed a successor employer who is obligated to bargain with the Union pursuant to the CBA.

C. Perfectly clear successor

Alternatively, the General Counsel contends that RHS failed to clearly enunciate new terms and conditions to employees and is, thus, a perfectly clear successor. RHS denies such a status because it did not hire a majority of Preferred employees; further, RHS argues that it repeatedly informed employees that they were subject to an application process, that new terms and conditions would apply, and that it was rejecting the collective-bargaining agreement.

Ordinarily, a successor employer is free to set initial terms on which it will hire the employees of a predecessor. *Burns International Security Services, Inc*., 406 U.S. at 294–295. However, a successor waives this right when it has either actively or tacitly misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. See *Spruce Up Corp.*, 209 NLRB 194, 195 (1974).

In July, Brown reassured Ridgewood employees that "99.9 percent" of them would be hired by RHS. Brown also responded to an inquiry about the CBA by indicating that she would have to honor it and recognize the Union. In so doing, Brown expressed a belief that things would basically stay the same. This impression was modified somewhat by Smith's subsequent letter in which he clarified that the rehiring issue was still under consideration. However, Smith essentially confirmed the collective-bargaining relationship with the Union in mid-July by insisting that the CBA be renegotiated. It was not until September 23, one week before the commencement of RHS's operations and weeks after bargaining unit members submitted to the hiring process, that RHS drastically changed its position by rejecting any notion of a collective bargaining relationship between RHS and the Union.

The suspect timing of these events reveals a scheme by the Respondents to avoid disrupting operations during the transition process while they figured out a way to circumvent potential obligations under the CBA. During the rushed and chaotic hiring process, some employees were asked about their wages, benefits, and paycheck deductions and/or whether they were members of the Union. They were also told that about possible alterations in their wages and benefits. During this period of time, however, RHS never announcedt that it would alter the terms and conditions of employment. See *Cadillac Asphalt Paving Co*., 349 NLRB 6, 11 (2007). Thus, from the perspective of affected employees, RHS, by "tacit inference," misled them into believing that they would be retained without significant changes in their terms and conditions of employment. See *Dupont Dow Elastomers*, 332 NLRB 1071, 1074–1075 (2000).

Respondents, citing to *Banknote Corp*., 315 NLRB 1041 (1994), argue that the change of heart made clear its intention to alter the terms and conditions of employment. See also *Marriott Management Servs*., 318 NLRB 144 (1995) (for perfectly clear analysis, communications with the union are deemed communications with the employees). In so arguing however, they fail to distinguish between concurrent and subsequent disavowals of the terms and conditions of employment. See *Starco Farmers Market*, 237 NLRB 373 (1978) (collecting cases). In *Banknote Corp*., the employer was not a perfectly clear successor given that it concurrently stated its intention both to hire incumbent employees and not to be bound by its predecessor's collective-bargaining agreement. 315 NLRB at 1044. In the instant case, however, Brown initially stated her intention to hire a substantial portion of the incumbent workforce; only subsequently did RHS, as RHCC's joint employer created for the purpose of operating the Ridgeview facility, alter this stance. Thus, RHS was a perfectly clear successor to Preferred. See *Grenada Stamping & Assembly*, 351 NLRB 1152, 1155 (2007).

D. Discriminatory hiring

The General Counsel also alleges that RHS utilized a pretextual hiring scheme to avoid incurring a bargaining obligation, as evidenced when Brown exhibited antiunion animus in several meetings with employees, unlawfully refused to hire certain bargaining unit employees and hired employees into a new helping hands classification in order to displace bargaining unit employees. The Respondents deny the allegations, maintaining that RHS utilized neutral hiring criteria, a preferential hiring timeline for Preferred applicants, and hired roughly 80 percent of Preferred applicants.

A subsequent employer has a right not to hire its predecessor's employees. See *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 261–262 (1974). That right, however, does not extend to a refusal to hire a predecessor's employees solely because they were union members or to avoid having to recognize the union, which practices are unlawful. See id. at 261 fn. 8; *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992). To establish that a successor has engaged in discriminatory hiring in violation of 8(a)(3), the General Counsel must show that the employer failed to hire employees of its predecessor and was motivated by union animus. *Planned Building Services*, *Inc.,* 347 NLRB 670, 673 (2006). The burden then shifts to the employer to show that it would not have hired the predecessor's employees even in the absence of an unlawful motive. If an employer is found to have discriminated in hiring, the Board assumes that, but for the unlawful discrimination, the successor would have hired the predecessor employees in their unit positions. Id. at 672 (citing *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979), enfd. in relevant part sub nom. *Kallmann v. NLRB,* 640 F.2d 1094 (9th Cir. 1981)). The Board also assumes that the union would have retained its majority status. *State Distributing Co.*, 282 NLRB 1048 (1987). Consequently, if the successor employer has refused to recognize and bargain with the union, it will be held to have violated Section 8(a)(5) and (1) of the Act and will be disqualified from setting initial terms and conditions of employment for the new workforce. *Planned Building Services*, 347 NLRB at 674 (citing *Love's Barbeque*, 245 NLRB at 82).

An unlawful refusal to hire may be shown by the absence of a convincing rationale for the refusal to hire, inconsistent hiring practices, overt acts, or conduct evidencing a discriminatory motive, including evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall workforce. *Planned Building Services*, 347 NLRB at 673 (quoting *U.S. Marine*, 293 NLRB at 670).

Brown, during meetings, stated that she did not see the need for a Union and expected that management and employees would resolve any issues that arose. She even went so far at one point as to say that the facility would close if the Union was involved. Brown later sent each employee a letter reasserting her position that the Ridgewood facility was operating "non-union." The letter, which also included preemptive action to keep the Union out of the facility, stated, inter alia, that "unions . . . are unnecessary at our facility. . . without a union we can be our most productive, efficient and flexible so that this facility will prosper. I do not want you to have to pay monthly dues to the union when we can make Ridgewood a great place to work just by working together . . .Unions have declined over the last few decades, and I think for good reason. Unions have not been able to provide employees with those things that employees value most including job security. I am sure you know of the many unionized plants that have shut down around this country."

Brown reinforced this message in subsequent meetings, during which she told employees that the Union was no longer recognized. Toward that end, Cooper, the former director of nursing, warned an employee that recruitment on behalf of the Union could result in termination. Those statements to employees by Brown and Cooper demonstrated antiunion animus. *Advanced Stretchforming International, Inc.*, 323 NLRB 529, 530–531 (1997); *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 9 (2014) (collecting cases).

Additional evidence of animus has been demonstrated through RHS's creation of the helping hands classification. See *CNN America, Inc*., 361 NLRB No. 47 (2014) (creation of a hiring scheme which utilizes an inflated bargaining unit demonstrates discriminatory animus).

This preexisting animus factored into RHS's discriminatory hiring. During job interviews, most Preferred employees were asked about their payroll deductions, which included deductions for union dues. One would reasonably assume that a company assuming the operations of a facility would already have a sense of the total payroll and benefits costs involved in running the business. As such, individual inquiry into employees' payroll deductions appears suspect and no explanation was provided as to why RHS's agents needed such information when interviewing employees who performed bargaining unit work. If the circuitous approach to eliciting the information was not invasive enough, some employees were simply asked if they were members of the Union. The fact that these employees were later offered employment is not dispositive. In asking such questions to interviewees, the Company unlawfully restricted applicants in exercising their Section 7 rights in violation of 8(a)(1). *Bighorn Beverage*, 236 NLRB 736, 751 (1978); *Rochester Cadet Cleaners*, 205 NLRB 773 (1973).

While the Respondents' provided demonstrated a business justification for refusing to hire 7 of the 11 employees at issue, their discriminatory hiring scheme is also evident in the refusal to hire four Preferred employees who warranted offers of employment. Betty Davis, Gina Eads and Connie Sickles had satisfactory documented work histories at Preferred and uneventful job interviews, but were denied employment because they were previously terminated at Ridgeview.

The Respondents assert that RHS's "no-rehire" policy was neutral and, thus, legitimate. Citing *Raytheon v. Hernandez*, 540 U.S. 44 (2003), the Respondents argue that a policy which refuses to hire individuals who have been terminated is by definition nondiscriminatory. The question in *Raytheon*, however, was limited to a single employer; by definition, then, the policy was nondiscriminatory in that it applied to all employees equally. See *Raytheon*, 540 U.S. at 53–55. In the instant case, the question is whether RHS employed the no-rehire policy as a means to discriminate as between separate employers.

Brown and RHS interviewers, when asked, indicated that a previous discharge from Ridgeview would not be grounds for disqualification. At the hearing, the Respondents failed to rebut the inference that a no-rehire rule was subsequently applied as a discriminatory means by which to disqualify unit member applicants.

Wilson was refused employment on the flimsiest of rationales – that she was allegedly terminated from a previous facility due to an altercation with a coworker. No such incident, however, was documented in Wilson's Ridgeview personnel file, nor is there any indication that she was asked about the incident during her job interview and given an opportunity to explain.

In conclusion, RHS has substantial continuity of operations with its predecessor. It misclassified hiring hands and, in so doing, miscalculated the scope of the appropriate bargaining unit. Therefore, incumbent employees comprise a majority of the bargaining unit and RHS was, therefore, a successor employer. Moreover, by presenting itself to employees as a perfectly clear successor and then engaging in a discriminatory hiring scheme, RHS forfeited its right to

unilaterally establish the initial terms and conditions of employment. By refusing to recognize the Union as the legal representative of unit employees, the Respondents, as a single employer, violated Section 8(a)(5) and (1) of the Act. In the course of that scheme, the Respondents violated also Section 8(a)(3) and (1) by refusing to hire four unit employees who merited offers of employment simply because Respondents wanted to reduce the number of Unit members hired. Finally, the Respondents' unlawful interrogation of Preferred employees and statements to Preferred employees that the Respondents would not recognize the Union as their labor representative and unilaterally set their terms and conditions of employment violated Section 8(a)(1) of the Act.

III. Obligation to meet and notify Union in regard to discipline

The General Counsel alleges that the Respondents unilaterally changed employees' initial terms and conditions of employment. The Respondents, relying on the lack of any collective bargaining relationship with the Union, do not dispute the allegations that RHS changed the terms and conditions of Preferred employees hired by RHS, and that RHS refused, despite several requests, to bargain with the Union over such changes and their effects.

A successor employer violates Section 8(a)(5) and (1) when it unilaterally changes the terms and conditions of employment. *Pressrom Cleaners*, 361 NLRB No. 57, slip op. at 6 (2014). The remedy for such a violation is the restoration of the predecessor's terms and conditions until the parties bargain in good faith. Id.

RHS terminated employee Caitlyn Bolinger, and subsequently disciplined and ultimately terminated employees Brooke Watson and Misty Mauldin, all without notice to or bargaining with the Union. RHS's discipline and/or subsequent termination of these employees unilaterally changed the terms and conditions of their employment. Thus, by failing and refusing to bargain with the Union prior to engaging in such actions, RHS violated 8(a)(5) and (1) of the Act. *Rush University Medical Center*, 362 NLRB No. 23 (2015).

CONCLUSIONS OF LAW

1. The Respondents Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc. constitute a single employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. As a single employer, the Respondents are a successor employer of a majority of the unit employees, as well as a perfectly clear successor, of their predecessor employer at the Ridgewood facility.

2. The Union, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been, and continues to be, the exclusive bargaining representative of LPN's, nurses aides, housekeeping employees, dietary employees, laundry employees, maintenance employees, and the food supervisor employed by the Respondents at the Ridgewood facility in Jaspar, Alabama.

4. By (1) refusing to recognize and bargain with the Union on July 15, 2013 and continuously thereafter, (2) unilaterally changing terms and conditions of employment of the predecessor's employees commencing on October 1; and (3) refusing to provide the Union with information requested on September 13 and 25, and October 1, 2013 that was necessary and relevant to the collective-bargaining agreement, the Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The Respondents violated Section 8(a)(1) by: (1) interrogating bargaining unit employees by inquiring about their union membership during job interviews during September 2013; (2) informing bargaining unit members in August 2013 that they would not recognize the Union and would unilaterally change their terms and conditions of employment; and (3) warning an employee in December 2013 that she would be terminated if she supported the Union.

6. The Respondents violated Section 8(a)(3) and (1) of the Act in September 2013 by engaging in the following discriminatory hiring scheme in order to avoid its bargaining obligation with the Union: (1) creating a new job classification in order to create a workforce composed of less than a majority of the predecessor's employees in order to avoid its bargaining obligation with the Union; and (2) refusing to hire the following unit employees: Betty Davis, Gina Eads, Connie Sickles and Vegas Wilson.

7. The Respondents violated Section 8(a)(5) and (1) of the Act by disciplining and/or discharging Misty Mauldin, Brook Watson, and Caitlyn Bolinger without first notifying and offering the Union an opportunity to bargain over their discipline.

8. All other complaint allegations not included above are dismissed.

REMEDY

Having found that the Respondents engaged in certain unfair labor practices, I shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents, having discriminatorily discharged employees Betty Davis, Gina Eads, Connie Sickles and Vegas Wilson, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

The Respondents shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Tortillas Dan Chavas*, 361 NLRB No. 10 (2014).

The Respondents shall recognize and, upon request, provide with the Union with information requested that is relevant and necessary to its role as employees' bargaining

representative, and bargain in good faith with the Union as their employees' exclusive collective-bargaining representative concerning their wages, hours, benefits and other terms and conditions of employment. Additionally, the Respondents, upon request, shall rescind any and all changes the Respondents have made to employees' terms and conditions of employment and restore those that were in effect prior to those changes.

Finally, the Respondents shall be ordered to bargain with the Union regarding the discharges of unit employees Caitlyn Bolinger, Brooke Watson and Misty Mauldin. I decline to order the additional remedies of reinstatement and/or backpay. Although a nullity pursuant to the Supreme Court's decision in *Noel Canning,* 134 S. Ct. 2550 (2014), the Board's rationale in *Alan Ritchey*, 359 NLRB No. 40 (2012), since closed, provides some guidance on this issue. In that case, the Board held that an employer, whose employees are represented by a union at a time when the parties have not arrived at a first contract or an interim grievance procedure, must bargain with the union before imposing discretionary discipline on unit employees. While the parties, in this case, are bound to an extant CBA, the facts otherwise fall within the *Alan Ritchey* rationale – the discharges were within the employer's discretion, were subject to bargaining, and were implemented without affording the Union an opportunity to bargain.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[65]

ORDER

The Respondents, Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc., Birmingham, Alabama, their officers, agents, successors, and assigns, shall

1. Cease and desist from

Discharging or otherwise discriminating against any employee for supporting the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) or any other union.

Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its Unit employees.

Failing to bargain with the Union concerning the discharges of Unit employees Misty Mauldin, Brook Watson, and Caitlyn Bolinger.

Failing to furnish to the Union information it requested on September 13 and 25, and October 1, 2013.

Coercively interrogating any employees about union support or activities, informing bargaining unit members that they will not recognize the Union and/or will unilaterally change

[65] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

their terms and conditions of employment, or threaten to terminate employees if they support the Union.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

Within 14 days from the date of the Board's Order, offer Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Make Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> [A]ll full time and regular part time employees employed by the facility, including LPN's, nurses aides, housekeeping employees, dietary employees, laundry employees, maintenance employees, and the food supervisor (it is understood that in the event any of the preceding job titles change, they will remain in the bargaining unit) but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

On request, bargain with the Union Misty Mauldin, Brook Watson, and Caitlyn Bolinger without first notifying and offering the Union an opportunity to bargain over their discipline.

Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

Within 14 days after service by the Region, post at its facility Birmingham, Alabama copies of the attached notice marked "Appendix."[66] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are

[66] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 15, 2014.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. March 27, 2015

_____

Michael A. Rosas
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting [*union name*] or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> [A]ll full time and regular part time employees employed by the facility, including LPN's, nurses aides, housekeeping employees, dietary employees, laundry employees, maintenance employees, and the food supervisor (it is understood that in the event any of the preceding job titles change, they will remain in the bargaining unit) but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, within 14 days from the date of this Order, offer Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Betty Davis, Gina Eads, Connie Sickles, Vegas Wilson, Misty Mauldin, Brooke Watson, and Jonathan Keaton whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Betty Davis, Gina Eads, Connie Sickles, and Vegas Wilson for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Betty Davis, Gina Eads, Connie Sickles, Vegas Wilson, Misty Mauldin, Brooke Watson, and Caitlyn Bolinger and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, on request, bargain with the Union over the discipline and discharges of Misty Mauldin, Brooke Watson, and Caitlyn Bolinger.

RIDGEWOOD HEALTH CARE CENTER, INC.
AND RIDGEWOOD HEALTH SERVICES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

233 Peachtree Street N.E., Harris Tower, Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-113669 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (404) 331-2870.